SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 465.

JOAB H. BANTON, as District Attorney of the County of New York, State of New York, and TRANSIT COMMISSION, State of New York,

Appellants,

against

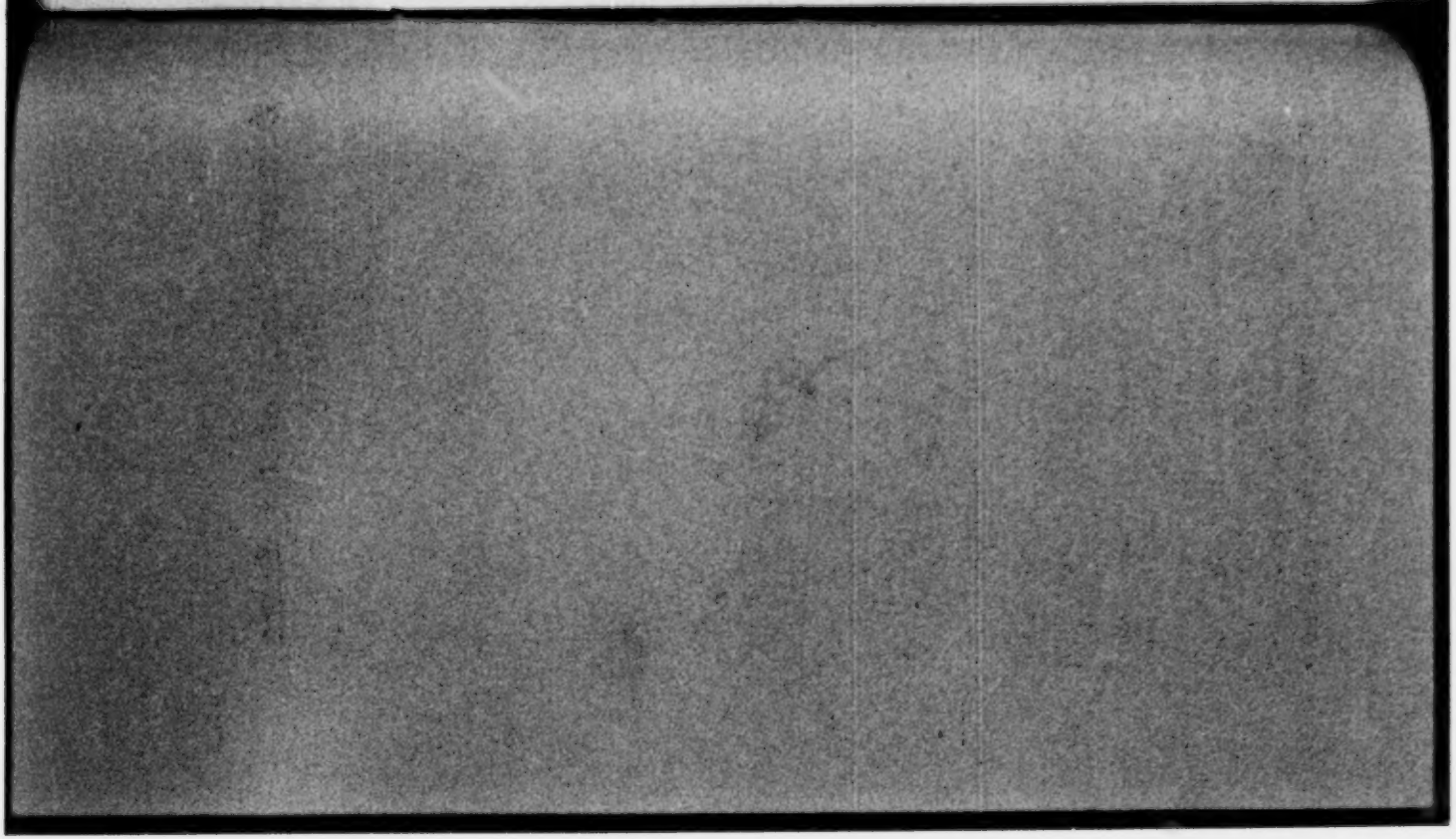
BELT LINE RAILWAY CORPORATION.

BRIEF IN REPLY
for Appellant Transit Commission.

HOWARD THAYER KINGSBURY,
Special Counsel to Transit Commission.

GEORGE H. STOVER, *Assistant Counsel.*

Counsel for Appellant Transit Commission.



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The Brief submitted by the Appellee bases many of its principal arguments, not upon the statistics of actual operations since the injunction, but upon the unfounded hypotheses and unproved conjectures embodied in its Exhibit BP, which is doubtless a great work of the creative imagination but has so little relation to the facts of this case that neither the Master nor the District Court deemed it necessary to pay any attention to it. Counsel for this Appellant

deem discussion of these arguments equally unnecessary, but think it proper to comment briefly on certain of the other arguments and assertions of the Appellee.

I.

The Effect of the Injunction.

It is most significant that Appellee now expressly states that

> "at no time has the Belt Line Company "claimed that the decrease of expenses ac- "tually incurred after the injunction was "due to the cutting off of the transfers" (Appellee's Brief, p. 61).

This is just what this Appellant has always argued, but it is wholly at variance with the theory upon which the Master decided the case.

This shows that Appellee's Counsel realizes that the actual facts of operation do not support the Master's decision, and therefore takes refuge in part in the cost-per-passenger theory, and in part in the assumed result of a resumption of transfers, based upon a fallacious theory that expenses of operation increase proportionately with the number of passengers carried. Appellee's Counsel states that this proposition is "undisputed" (Brief, p. 32). On the contrary, it is not only disputed, but disproved.

The rule must work both ways, if it works at all. If expenses increase proportionately with an increase of passengers they must decrease proportionately with a decrease. Appellee's Counsel contends that the decrease in the total number of passengers was due to the cutting off

of the transfers (Brief, p. 25), but by admitting that the decrease of expenses was not due to this cause, he necessarily admits that it was not due to the decrease in the number of passengers. The Record shows that it could not have been, since the actual service was not substantially decreased.

Upon Appellee's own theory on this point, it has no grievance, and can have none, unless more service is required, and the requirement enforced or sought to be, and the additional expense of such additional service duly proved. The alleged proportionate increase in expense having been both disproved and admitted away, there is nothing in the Record on which to predicate any finding on this point.

The letters from the Commission directing more service on 59th Street (Rec., pp. 307, 308, 311, 314, 321) were not orders, made after a hearing and thus having any binding force. It will be time enough to consider the effect of such orders if and when they are made. The question of actual or potential overcrowding is not and cannot be before this Court.

The statements of Appellee's counsel concerning the effect of the testimony of William O. Smith, Transit Inspector (Brief, pp. 30, 58) are not correct. The witness testified that the service on the 59th Street Line *could* be increased about 10%, not that it *should* be (Rec., pp. 248-251). The increase which he suggested was only in the "rush hours" (Rec. p. 249). There was no suggestion by any one of any increase in service through the other hours of the day.

The testimony of Appellee's witnesses Thompson and Farrington in regard to the alleged proportionate increase in number of passengers,

car mileage and expenses, was all a matter of opinion and conclusion, was based upon the assumption that more cars and mileage would be required to carry an increased number of passengers than actually served to carry them before the injunction, and ignored the manifest fact that certain important expenses of operation, such as administration and overhead, taxes, maintenance of way and the like, are unaffected by changes in the number of passengers.

Appellee's argument, so far as it proves anything, proves that the injunction decreased rather than increased the revenue, and did not decrease the expenses of operation but merely relieved the 59th Street Line from overcrowding, a matter not within the cognizance of this or any Federal Court.

The actual adverse effect of the injunction upon the revenue, and its negative effect upon the expenses, as proved and admitted, sufficiently dispose of Appellee's conjectural computations of imaginary deficits which he asserts would result from a restoration of the transfers, but which are unsupported by the evidence or the Master's findings.

II.

The Exhaustion of Legal Remedies.

Appellee contends that, because this Court has held that application for a re-hearing is not necessarily a condition precedent to resort to the Federal Courts (Brief, p. 36), it was unnecessary for it to await the orderly determination of the actual re-hearing. This is a *non sequitur.*

The fact that the granting of a re-hearing is discretionary may dispense from applying for it before invoking the Federal jurisdiction, but where a party has applied for and been granted a re-hearing, and has thus availed himself of this legal remedy, even if resort to it be optional, he cannot be deemed to have exhausted it unless and until the re-hearing has been determined or there has been an actual and wrongful refusal or neglect to determine it.

The pleadings elaborately quoted by Appellee's Counsel (Brief, p. 39) fall far short of an admission of final submission sufficient to start the thirty day period running and the answer quoted from expressly denies refusal or wrongful neglect to decide (Rec., p. 51).

The proof that there had not been a final submission seems to have touched a sensitive spot. It is the Appellee's Counsel who suggests the insinuations to which he so vehemently objects. Counsel for this Appellant merely stated the facts, and left it to the Court to draw its own inferences. The proof in question was made in due season before the Master at the session of January 5, 1923, some six weeks before the close of the Reference on February 14, 1923 (Rec., pp. 237, 252, 262, 263). The point was argued before the Master, and not withheld undisclosed until the argument before the District Court, as stated by Appellee's Counsel (Brief, p. 42). Appellant's Counsel do not consider it necessary to enter into a debate with their adversary over his characterization of this well founded and serious contention.

The case cited by Appellee's Counsel (*Nor. Pac. Ry.* v. *North Dakota*, 236 U. S. 585), to support his contention that the voluntary apportionment

of the joint rate sufficiently completed the compulsory rate-making process (Brief, p. 42), is not in point on this question. There the *State* Court had held that "the result, in substance, would have been the same" (p. 592), and this Court held that the facts thus found by the State Court "must be taken to be established" (p. 593). It does not appear that this Court has ever held that the voluntary apportionment of a joint rate is equivalent to the compulsory fixing of each share by the rate-making authority.

III.

Voluntary Acceptance of Rate by Appellee.

The annulling by the Commission of the new tariff filed by plaintiff was not the compulsory fixing of a rate by the Commission (see Appellee's Brief, p. 47). It merely prevented the plaintiff from thus evading the order of October 29th, 1912, which was in effect prior to plaintiff's incorporation.

By its incorporation plaintiff succeeded to the obligations of its predecessor. Among these obligations was the obligation to carry transfer passengers for a five cent joint rate. This was not an unconstitutional requirement as to the predecessor, so the case does not come within the exception suggested by the dictum in *Minor* v. *Erie R. R. Co.*, 171 N. Y., 566, invoked by Appellee (Brief, pp. 69, 70).

That case is a direct authority in support of this Appellant's position, as a brief review of its facts will show.

In 1895, the New York Legislature passed the Mileage Book Act, effective June 15, 1895, re-

quiring railroad corporations to issue mileage books entitling the holder to travel 1,000 miles over their roads at a reduced rate. In an action brought against the New York, Lake Erie and Western Railroad Company and its Receivers to recover a penalty for failure to issue such mileage book, the Court of Appeals held that the act was unconstitutional, as the company had been incorporated prior to its enactment (*Beardsley* v. *N. Y. L. E. & W. R. R. Co.*, 162 N. Y. 230). After the act became effective, namely on November 14, 1895, the Erie Railroad Company was incorporated under Section 3 of Chapter 688 of the Laws of 1892 (*Stock Corporation Law*, Sec. 9), and acquired the property of this same New York, Lake Erie and Western Railroad, *which had been sold under foreclosure.* In another action for a similar penalty brought against the Erie Company, the Court of Appeals held that the Act was not an infringement of that company's constitutional rights, since the company had been incorporated after it became effective (*Minor* v. *Erie R. R. Co.*, 171 N. Y. 566).

This disposes of the contention that the Belt Line Railroad Corporation in acquiring the property and franchises of its predecessor also acquired the right to contest the validity of the transfer order. The Court of Appeals refused to nullify the provision which subjected the new corporation to the duties imposed upon the old, or to hold that the "rights, privileges and franchises" of the old included the right to contest something which the new company had accepted as a condition of its creation.

As has been pointed out in this Appellant's main Brief (pp. 54-55), the subsequent amendment of Section 9 did not destroy its force nor the effect of the *Minor* decision, but merely limited the duties, which the new corporation was required to assume, to such as applied to its predecessor and not all those which apply to all railroad corporations generally.

IV.

The Cost-per-Passenger Theory.

Appellee evidently places its main reliance on this erroneous theory. It has never been sustained or enforced by this Court. The case invoked by Appellee (*Nor. Pac. Ry.* v. *North Dakota*, 236 U. S. 585) does not enunciate or apply it. In that case lignite coal, the particular commodity the rate for the transportation of which was attacked, stood in the same relation to the general business of the railroad as any other commodity and was therefore properly chargeable with a fair proportion of the general expenses of operation. It was not a special class of traffic, attracted by a special rate for a special service, bringing in additional revenue with little if any additional expense, which revenue would be lost in whole or in part by the abolition of the special rate.

Appellee contends that the order here attacked is a mere rate order, and not a service order. It is primarily a service order, and incidentally fixes a rate for that service. The service required is one continuous trip for one fare; the

rate-making portion of the order merely determines the amount of that single fare.

Appellee's own figures show little if any decrease in the cost per passenger, computed on its theory, after the injunction (Brief, p. 21), yet it still willingly carries a much larger number of two cent passengers than the injunction relieves it from carrying, and thus by its own practice admits in effect that the rate which it receives therefor is reasonable.

In the *North Dakota* case cited, one of the grounds of the Court's decision was that there was no practice of the carriers which supported a rate so low (236 U. S. at 597). Here Appellee's own practice, as well as the long established practice of street railroads in New York generally, supports it.

The *North Dakota* case also recognized the wide scope of legislative discretion in matters of classification and the impracticability of minute judicial scrutiny of every detail of a rate schedule. It is a fair inference of fact that transfer passengers, using the 59th Street Line as one link in a longer route, will usually ride for a shorter distance than passengers who make their entire journey upon that line. This of itself furnishes a sufficient basis for a reduced rate for such passengers.

The power of the rate-regulating authority, having jurisdiction, to fix joint rates for connecting carriers is well settled, and this Court has sustained a through rate so fixed at the same figure as the local rate of one of the carriers.

See *St. Louis S. W. Ry. Co.* v. *United States*, 245 U. S. 136, 142.

V.

The Seven Cent Transfer Rate.

Appellee consistently ignores the fact that the order fixing this rate, which was suspended before it became operative, was made more than two years before the date down to which statistics of operation were furnished to the Master, and that any inferences which might otherwise be drawn from it are fully rebutted by the proved results of the actual experiment.

The grant of a seven cent rate for intra-company transfers to the New York Railways Company proves nothing in regard to the condition and needs of the Belt Line. The New York Railway Company was and still is in the hands of a Receiver; the Belt Line is not and has not been. The New York Railways Company is a great system extending all over the City, the Belt Line is one small link in certain special routes made necessary by the location of Central Park.

The decisions of this Court are clear that a rate does not become confiscatory the moment it ceases to be fully compensatory. Cases to this effect are cited in this Appellant's main Brief (pp. 25, 31). This distinction has been very recently recognized in the case of *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388, at p. 396, where this Court pointed out that certain factors, such as past losses, good will and the like, are to be "considered in determining whether a rate charged by a public utility is reasonable," but are properly excluded in determining whether a legislative rate is confiscatory.

This Court has also said, by Mr. Justice Holmes:

> "We do not sit as a general appellate board of revision for all rates and taxes in the United States. We stop with considering whether it clearly appears that the Constitution of the United States has been infringed."
>
> *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 446.

A "general appellate board of revision" could and should consider whether rates are reasonable, adequate and compensatory. The Federal Courts are limited to considering whether they are confiscatory.

In granting the seven cent rate the Commission was exercising legislative powers, and could establish as a "reasonable" rate one far beyond the non-confiscatory limit. The question presented to the Court is simply whether the five-cent rate is below that limit. This "distinction between the judicial function of declaring a rate unreasonable, and the legislative function of establishing a rate as reasonable" has been repeatedly recognized by this Court.

> See *Det. & Mackinac Ry.* v. *Mich. R. R. Comm.*, 235 U. S. 402, 406, affirming 203 Fed. Rep. 804, 870; and cases cited.

VI.

Valuation.

The discussion of this question will be left to the Corporation Counsel, not because, as Appellee suggests, the Transit Commission is reluctant to deal with the testimony and estimates of Mr. Madden, prepared for a wholly different purpose and from a different point of view from that involved in this case, but because the Corporation Counsel is especially qualified by his experience to treat this complicated and technical subject, and it is assumed that this Court does not wish to be burdened with the reduplication of argument.

Conclusion.

This Reply has been limited to a brief mention of certain salient points in Appellee's Brief which appeared to call for special comment. The absence of discussion of Appellee's other arguments is not to be taken as admitting that they are either pertinent or valid. It is believed that they are sufficiently met in advance in the Main Brief, and that its conclusions remain unshaken.

Respectfully submitted this 9th day of March, 1925.

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